DOCUMENT RESUME

ED 102 231 UD 014 615

TITLE	Inequality in Education, Number 18, October 1974: Sex Discrimination.
INSTITUTION	Harvard Univ., Cambridge, Mass. Center for Law and Education.
SPONS AGENCY	Office of Economic Opportunity, Washington, D.C.
PUB DATE	Oct 74
NOTE	66p.
EDRS PRICE	MF-$0.76 HC-$3.32 PLUS POSTAGE
DESCRIPTORS	Civil Rights; Educational Change; *Educational Opportunities; *Educational Policy; Federal Court Litigation; Federal Legislation; Government Role; *Legal Problems; Public Education; Public Policy; *Sex Discrimination; Student Rights; *Womens Education
IDENTIFIERS	Education Amendments 1972; Kalamazoo; Michigan

ABSTRACT

The contents of this volume published by the Center for Law and Education, which was established to protect and advance the legal interests of the poor through research and action on the legal implications of educational policies, include the following articles: "Introduction" and "Sexism in Public Education: Litigation Issues," Susanne Martinez; "Sex Discrimination Against Students: Implications of Title Nine of the Education Amendments of 1972," Margaret C. Dunkle and Bernice Sandler; "Chapter 622: One State's Mandate," Regina Healy and Diane Lund, an examination of the first anti-sex discrimination legislation in the country, which was passed into law by the Governor of the Commonwealth of Massachusetts on August 5, 1971: "Kalamazoo: A Model for Change," Carol Ahlum, which examines the activities of the Committee to Study Sex Discrimination in the Kalamazoo Schools and the changes in school activities resulting from the actions of that committee; and "Judicial Standards for Determining Sex Discrimination," Paul Weckstein. Also included is a regular feature of the journal, "Notes and Commentary," which reviews current developments in the issues of sex discrimination, classification, corporal punishment, and student rights. (JM)

INEQUALITY IN EDUCATION

Number Eighteen
October 1974

Center for Law and Education
Harvard University

ED102231

SEX DISCRIMINATION

INEQUALITY IN EDUCATION
Number Eighteen, October 1974

Published by the
Center for Law and Education
Harvard University, Larsen Hall
14 Appian Way
Cambridge, Massachusetts 02138

Staff
Editor: Leah Levy
Editorial Assistants: JoAnn Vogt and Sharon Schumack
Circulation: JoAnn Vogt
Back Issues: Charles Finschhaem

Inequality in Education is published quarterly and is sold by subscription for an annual subscription fee of $5.00.

The Center for Law and Education was established by Harvard University and the United States Office of Economic Opportunity to protect and advance the legal interests of the poor through research and action on the legal implications of educational policies, particularly those affecting equality of educational opportunity.

Director: Robert Pressman

Contents

Susanne Martinez — 3 Introduction
Susanne Martinez — 5 Sexism in Public Education: Litigation Issues
Margaret C. Dunkle and Bernice Sandler — 17 Sex Discrimination Against Students: Implications of Title IX of the Education Amendments of 1972
Regina Healy and Diane Lund — 30 Chapter 622: One State's Mandate
Carol Allcutt — 37 Kalamazoo: A Model for Change
53 Notes and Commentary
Paul Grieskamm — 58 Judicial Standards for Determining Sex Discrimination

This publication was prepared pursuant to a grant from the Office of Economic Opportunity. Grantees undertaking such projects under government sponsorship are encouraged to express freely their professional judgment. Therefore, points of view or opinions stated in this publication do not necessarily represent official Office of Economic Opportunity position or policy.

Introduction

Why discuss the issues of sex discrimination in the schools in a book for lawyers, especially considering their limited time and resources? The answer lies both in fact about the controls exercised by legal services agencies and the role of the schools in socializing and molding citizens.

Data contributed by the United States Department of Labor indicate that forty percent of 3.5 million families with children below the poverty level in 1970 were headed by women. The median salary for women in the full census was $4,977 compared to $8,227 for men. It has been estimated that over half of today's high school girls will work full time for up to thirty years, and ninety percent of these high school girls will be employed for other significant periods of time. Unless major changes are made in the educational options and opportunities available to these students, a vast majority will find themselves doomed to limited, low-paying and marginal employment.

Schools are the primary vehicles in our society for socialization and career curriculum. To the extent that public schools treat young women as second class citizens, inferior to their male classmates and less worthy of expenditures of educational resources, women will continue to occupy the lower economic strata of our society. Despite the widespread myth that young girls can look forward to a carefree married life supported by a male breadwinner, the facts are that the majority of women will work, and will work in economically disadvantaged jobs.

Legal services attorneys have an important and legitimate obligation to exert their efforts to break the cycle of poverty and low productivity generated, at least in part, by the failure of our schools to accord young women equal educational opportunities. Just as achieving equal educational opportunities in the public schools has been a vital and ground breaking issue for oppressed minorities, equal educational opportunities for women are a necessary ingredient to the attainment of equal justice and opportunity for members of both sexes.

Susanna Shannon

SEXISM IN PUBLIC EDUCATION

Litigation Issues

by Susanna Blankman

country. It attempts to provide some insights into the scope and nature of practices which discriminate against students on the basis of sex, and the changes in these practices which might well be required for an institution to be in compliance with federal law. While discrimination against females was the major reason for the passage of the legislation, the law covers discrimination against *either* women or men on the basis of sex.

Until the fall of 1971, there was no federal legislation prohibiting sex discrimination among students at any level of education. Female students could be (and were) legally excluded from schools and colleges, admitted on a restrictive quota basis, denied admission to certain classes and subjected to a variety of other discriminatory practices. Females had no legal recourse when educational institutions denied them the opportunity that was regarded as the "birthright" of their brothers.

Amendments to the Public Health Service Act Prohibiting Sex Discrimination

The first federal law prohibiting sex discrimination among students became effective on November 18, 1971. Titles VII and VIII of the Public Health Service Act (PHSA) were amended to prohibit sex discrimination in admissions to federally funded health training programs.[5] There are no exemptions from coverage.

Although the legislation itself speaks only of admission to programs, it appears that the final regulations will also cover treatment of students already enrolled in programs and treatment of employees working directly with applicants to or students in such programs.[6] This broad interpretation is supported by the legislative history of the amendments which indicates that Congress intended to prohibit discrimination among individuals already enrolled in programs as well as applicants.[7] It also appears that an institution's general admissions policies and practices are covered in cases where the federally funded health training programs can be selected as a major after students are admitted. Otherwise, there would not be a nondiscriminatory pool of applicants from which to select students.

The Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW) is charged with enforcing the nondiscriminatory provisions of the PHSA. Noncompliance with the requirements of this legislation may lead to the delay of awards of PHSA Titles VII and VIII funds, revocation of current awards or debarment of an institution from eligibility for future awards. In general, the sex discrimination provisions of the PHSA are consistent with and foreshadow the coverage and provisions of Title IX.

Title IX of the Education Amendments of 1972[8]

Title IX of the Education Amendments of 1972 prohibits discrimination in federally assisted education programs[9] against students and employees on the basis of sex.[10] The key provision of Title IX reads:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[11]

In addition to the prohibition against sex discrimination in educational institutions, Title IX also amends a number of other laws. Section 906 amends various portions of the Civil Rights Act of 1964[12] and the Fair Labor Standards Act of 1938 to include executive, professional and administrative employees under the Equal Pay Act.[13] Section 904 forbids covered educational institutions from denying an individual admission because of blindness or severely impaired vision.[14]

The sex discrimination provisons of Title IX are patterned after Title VI of the Civil Rights Act of 1964[15] which prohibits discrimination against the beneficiaries of federal money on the basis of race, color and national origin, but not sex.[16]

Both Title VI and Title IX are enforced by the Office for Civil Rights of the Department of Health, Education and Welfare. The legal sanctions for noncompliance are identical: if an institution does not comply with the law, the government may delay awards of money, revoke current awards or debar institutions from eligibility for future awards. In addition, the Department of Justice may also bring suit at HEW's request.

Any educational institution which receives federal monies by way of a grant, loan or contract (other than a contract of insurance or guaranty) is

required to comply with the requirements of Title IX.[17] This includes all schools: kindergartens, preschools, elementary and secondary schools, vocational schools, junior and community colleges, four-year colleges, universities and graduate and professional schools.[18] Private, as well as public, institutions are subject to the requirements of Title IX if they accept federal financial assistance.

There are two overall exemptions to Title IX coverage which Congress specifically stated in the legislation:[19]

- An institution controlled by a religious organization is exempt to the extent that the application of the anti-discrimination provisions is not consistent with the religious tenets of the organization. Thus discrimination in such institutions on the basis of sex for reasons of custom, convenience or administrative rule is prohibited. This exemption was originally included in the legislation to exempt divinity schools. The burden of requesting and justifying this exemption lies with the educational institution.
- A military school is exempt if its *primary purpose* is to train individuals for the military services of the United States or the merchant marines.[20] This exemption apparently applies to military schools at any level and the U.S. military academies. It does not apply when military training is tangential to the primary purpose of the institution. An example of a tangential relationship would be offering Reserve Officers Training Corps (ROTC) courses.

In addition to these general exemptions, there is an exemption for *admissions* to certain types of institutions, most notably private undergraduate colleges and public single-sex undergraduate institutions. These exemptions are described *infra* at text accompanying notes 35–41. Any other exemptions made as a result of administrative decisions by the Department of Health, Education and Welfare are likely to come under strong criticism from both women's groups and members of Congress. In addition, the parallel wording of Title IX and Title VI would indicate that there is little, if any, legal justification for administratively exempting something from coverage under Title IX (sex), while clearly covering it under Title VI (race, color, national origin). Civil rights advocates are likely to view attempts to dilute Title IX coverage as an effort to dilute Title VI coverage.

Individuals and organizations can challenge any practice or policy which they believe discriminates on the basis of sex by writing a letter of complaint to the Secretary of Health, Education and Welfare. They can file on their own behalf or on behalf of someone else (or some other group). Complaints can be filed on a class action basis, with or without specific aggrieved individuals being named.[21] If the government finds discrimination in violation of Title IX, the statute requires that it first attempt to resolve the problem through informal conciliation and persuasion with the institution.[22] If this process fails to remedy the discrimination, HEW may either hold formal hearings or refer the case to the Deparment of Justice for judicial action. If discrimination is found following HEW hearings, federal financial assistance can be terminated.[23]

Title IX permits institutions to take affirmative action even in the absence of proven discrimination if, for one reason or another, there is limited participation by women or men in a federally assisted education program.[24] There is a distinction between *affirmative action* and *nondiscrimination*. Nondiscrimination means simply altering practices which have been discriminatory *(e.g.,* ceasing to recruit only at male schools). Affirmative action means taking steps to *remedy* a situation based on sex which was caused by past discrimination either by the school or by society at large *(e.g.,* sponsoring programs specifically designed to attract female applicants).

It is not clear to what extent affirmative action can involve specific preferential treatment on the basis of race or sex. Where past discrimination by an institution has been *proven,* it is clear that the courts or enforcing agency can require an institution to give preference to remedy the discrimination. The government cannot, however, base such a finding *solely* on statistical evidence of an imbalance without a formal determination that the imbalance represents discrimination.[25] However, the question of how to encourage voluntary action for the benefit of one group consistent with the purpose of the anti-

discrimination legislation, but without proof of wrongdoing—while at the same time, *not* discriminating against members of other groups—has not finally been resolved.[26]

Manifestations of Sex Discrimination

Many criteria, policies, practices and procedures which have traditionally been accepted by educational institutions perpetuate sex discrimination in both overt and subtle ways. In general, discrimination falls into two categories:

- *Overt* discrimination, which specifically excludes one sex or specifies different treatment or benefits based on sex. Examples would be admissions quotas for women, different standards of conduct for females and males and single-sex classes. In addition, *evaluating the same characteristics or conditions differently for women and men* would fall into this category. Such decisions are often unconsciously made because of stereotyped or inaccurate assumptions about the roles of women and men. Although these assumptions may be true for *some* women and men, they are not true for *all* women and men. Making decisions based on such class stereotypes can perpetuate discrimination.[27] For example, evaluating marital or parental status differently for each sex in determining eligibility for financial aid (because married men are "breadwinners" and "need" more money than married women) would fall into this category. A second subtle way in which overt discrimination might manifest itself is *when sex-neutral policies and procedures are not implemented.* That is, if an institution had a nondiscriminatory *official* policy, but *in practice* followed a discriminatory policy, it would be violating Title IX.
- Discrimination as a result of criteria, policies, procedures or practices which appear to be fair, but which have a disproportionate impact on one sex or the other. An example would be prohibitions against admitting older students (since women are less likely than equally qualified men to attend college at a young age) or granting preference to varsity athletes (since there are generally far fewer opportunities for women to compete in varsity athletics). Many policies and procedures which appear to be fair may unintentionally have a discriminatory impact on one sex or the other because one sex has been discouraged from participating in or discriminated against in certain activities. It is conceivable that an institution might argue that using such criteria is not an act of discrimination on *its* part and that it is not responsible for the consequences of past discrimination or exclusion by others.

A principle enunciated in a unanimous Supreme Court decision is relevant to this discussion. In *Griggs v. Duke Power Company*,[28] the Court said that any employment policy which has a disproportionate effect on minorities or other protected classes (even though it is fair on its face) and cannot be justified by business necessity, constitutes discrimination barred by Title VII of the 1964 Civil Rights Act. In addition, the Court said that it is the *effect* (rather than the *intent*) of a policy or procedure in operation that determines whether or not there has been discrimination. While the *Griggs* decision occurred in connection with employment discrimination, the same principle has been utilized by the courts in civil rights issues and can be expected to be applied to sex discrimination in education.

Recruiting Students[29]

Although the recruitment of students is generally not an issue at the elementary and secondary level, it is of increasing concern to post-secondary institutions because the growing competition for qualified students is becoming more intense. The recruiting process includes information conveyed by written materials (brochures, catalogs, applications) and recruiters or admissions personnel (through campus visits, interviews and correspondence). This process can discriminate against women both overtly and subtly if care is not taken to assure that it is unbiased.

The way in which an institution recruits students can have a significant impact on the number of women who apply.[10] Affirmative recruiting to alter a pattern of (sex)-segregation by one sex or the other is legal under Title IX. Such affirmative recruiting makes the pool of qualified women applying more accurately reflect the potential pool of applicants and does not necessarily alter the way in which an institution applies its criteria for admission.

Sometimes recruitment policies or practices are overtly discriminatory. More often they are overtly benign, but in one way or another have the effect of discouraging women from applying.

Policies and practices which fairly explicitly exclude women include:

- Recruiting only (or predominately) at male institutions, or recruiting primarily at institutions which discriminate on the basis of sex in their own admissions procedures, without recruiting at institutions which do not discriminate.
- Relying heavily on alumni for recruiting (rather than alumnae). This can have an especially profound effect at formerly all-male schools which have admitted women only recently.
- Application forms which ask married female students if they have their husband's permission to attend school, while not asking the same question of married male students. Similarly, asking both sexes for their spouses' permission, but evaluating the responses differently for women and men would be discriminatory.
- Recruiters who discourage females from pursuing their applications, while not similarly discouraging comparable male applicants.

The more subtle manifestations of discrimination in recruiting have perhaps the most devastating effect on women. Oftentimes institutions and their representatives unconsciously perpetuate discrimination in their publications, application materials and recruiting techniques. All of these items together give a prospective student the "flavor" of an institution and an indication of the status of women on campus.[11] They can either encourage women to apply or have a "chilling effect" on the number of women applicants. Such factors subtly tell a woman student if she is an outsider or not equally qualified (another

In addition to those listed below, the discriminatory policies and practices listed throughout this article can have a "chilling effect" by significantly discouraging women from applying:

- Having only or predominately male recruiters or admissions personnel.
- Having pictures in publications which show students as mainly male, while either not showing women at all or showing them primarily in "dating" or sex-role situations.
- Describing male sex-typed programs (such as engineering, physics, pre-med programs) in ways which discourage women from applying.
- Describing female sex-typed programs (such as home economics, elementary education, nursing) in ways which unnecessarily encourage women and discourage men from applying. For example, describing students in these programs as SHE implies that they are fields for women only.
- Using the "generic" HE in catalogs and other publications.
- Listing or having other policies (such as residency requirements or age cut-offs) which might have a disparate-female impact on women.

Admission to Programs[12]

The issue of sex discrimination in admissions is primarily of importance to post-secondary institutions, although it also has relevance for elementary and secondary vocational or special academic schools.[13] A thorough discussion of the admissions decision is critical for several reasons. If an individual is not admitted to an institution because of sex discrimination, equal treatment in the program becomes irrelevant. In addition, many of the considerations which affect the admissions decision are mirrored in later treatment of students. An understanding of factors which might influence the admissions decision aids in understanding the nature and operation of sex discrimination against students already admitted to a program.[14]

Exemptions from Admissions Provisions of Title IX[37]

Title IX statutorily exempts certain types of institutions from nondiscriminatory admissions. Largely because of pressure from parts of the educational community, Congress exempted the following institutions from nondiscriminatory admissions:[38]

- Private undergraduate institutions
- Preschools and elementary and secondary schools (other than vocational schools)[39]
- Single-sex, public undergraduate institutions[40]

These institutions are exempt from the admissions provisions of Title IX only.[41] They are not exempt from the obligation to treat students (and employees) in a nondiscriminatory manner in all areas other than admissions.

Sex discrimination in admissions is specifically prohibited in the following types of institutions:

- Public institutional undergraduate institutions
- Vocational schools, including vocational high schools
- Professional schools[42]
- Graduate schools[43]

Overt Discrimination in Admissions

In covered institutions, overt quotas that limit the percentage or number of women (or men) violate Title IX. Similarly, an admissions policy based on the number or percentage of applicants from each sex would violate Title IX. For example, admitting 30 percent of female applicants and 30 percent of male applicants would be admission by sex and could result in admitting members of one sex who were less qualified than some of the students of the other sex who were rejected. Also, ranking or evaluating applicants separately on the basis of sex would be a Title IX violation.

A more unconscious form of overt discrimination occurs when the same characteristics or conditions are evaluated differently for women and men. For example, because of stale assumptions about the roles of women and men, a well intentioned admissions officer or counselor may discriminate on the basis of sex by:

- Evaluating marital status as potential marital status (whether single, divorced, married or separated) differently for women and men. For example, admitting married men, but not married women.
- Making pre-admission inquiries concerning whether a person is "Ms., Miss, Mrs. or Mr."
- Evaluating parental status differently for females and males. For example, admitting unwed fathers (which is not admitting a unwed mother) or admitting men (but not women) with small children.
- Evaluating personality characteristics (such as "assertiveness") as a positive factor for one sex (males) and a negative factor for the other sex (females).
- Using different standards for admitting women and men because of assumptions about what are suitable and proper fields for women (e.g., home economics, nursing, elementary education) and men (e.g., science, medicine, auto mechanics).
- Refusing to admit men, but not women, with long hair.
- Admitting older men, but not older women.

Ostensibly Fair Criteria Policies, Practices and Procedures Which Have a Discriminatory Impact on One Sex

Many institutions believe that they have one blind (or sex-neutral) admissions criteria and procedures. However, a close examination of these ostensibly "neutral" criteria often reveals that a number are sex biased. For example, an institution might give preference to any "person" who has been a Rhodes scholar. (Since only men are eligible for Rhodes scholarships, this practice has a discriminatory impact on women.)

It is important to remember that many of the criteria evaluated by admissions officers and committees are not in themselves indicators of performance in a given program or institution. Rather, they are shortcut indicators of success in what is perceived to be a similar situation.

A distinction can be drawn between ultimate criteria and intermediate (indirect) criteria or qualities.

- Ultimate criteria are those which are essential to performing a job satisfactorily. (For example, interpersonal ability, writing skills, analytical skills, creativity, research ability or aptitude in a particular field.) Certainly, nothing, however, these criteria are often difficult or impossible to measure directly.
- Intermediate criteria, on the other hand, are the distinct approximate indicators which are used to roughly gauge the ultimate criteria or ability of a candidate. These are more easily evaluated than ultimate criteria and might include offices held in school, articles published, nature and extent of work experience, grades and test scores or attendance at a particular school.

Intermediate criteria are, of course, indispensable aids to narrowing the field of candidates. However, these criteria are by nature generalizations and as such may be both imprecise and arbitrary when used to measure the ability of a given individual. In addition, because of sex discrimination in society at large, women who have the desired ultimate qualities may not have had the opportunity to obtain the most desirable intermediate credentials. Therefore, blanket application of ostensibly neutral criteria could result in sex discrimination.

The Supreme Court has recognized, in Griggs v. Duke Power Company,[42] that certain criteria can prove

> artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[43]

The Court found that

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[44] (emphasis added)

There seems little doubt that this reasoning applies equally to similar discrimination against students in historically gender-based education programs.[45]

Assuming that the ultimate criteria evaluated by a selection committee are rationally related to the educational goals of the institution, it is then important to examine the intermediate criteria to determine if they are:

- valid indicators of the ultimate qualities desired;
- [illegible] are fair, that is, not discriminatory, including over-use or the effect.

If an intermediate criterion is in some way discriminatory, then the institution would be well advised to look for alternative measures. For example, an institution might consider "competitiveness" a desirable quality for students and use "participation in interscholastic or intercollegiate athletics" as an intermediate measure of competitiveness. Because athletic opportunities are severely limited for women in most institutions, such an intermediate criterion might eliminate women who have the desired ultimate quality competitiveness. Because discrimination against women often makes it more difficult for them to obtain impressive credentials (intermediate criteria), institutions may find that it is sometimes more difficult to assess the degree to which women can appear to most possess the desired ultimate qualities. As a beginning, an institution could formulate its list of acceptable intermediate criteria.

Examples of "intermediate criteria" which might have the effect of disproportionately excluding women include the following:

- Membership in a single-sex fraternity or organization. (In some schools, there is only a men's fraternity. In others, where there are two separate single-sex fraternities, the women's fraternity is often smaller and/or has higher admissions standards, with the result that fewer women or those men have this credential.)
- Similarly, using memberships in single-sex professional organizations as a criterion can lead to bias. (For example, until 1976 Phi Delta Kappa, the education fraternity, did not admit

ing is a cultivated art. Your authors, whose zeal in this regard never flags, refer you to Figures 111-50 and 53 as proof that female backs can keep an interest in anatomy alive.

Thus the "little bit" of difference in a woman's built-in biology urges her to ensnare a man. Such is the curse of estrogen.[100]

Differential treatment of women and men is generally more easily identified in textbooks than in most other curricula materials. Similar discrimination, however, may occur in the classroom in a variety of more subtle ways. For example, students at Western Michigan University have cited the following examples of teacher comments which discriminate against women:

- A biology teacher during a class field trip passed a junk car lot and said, "Well, there's women's biggest contribution to the world."
- Another professor told a woman student, "Don't worry, with your body, you'll get whatever you want."
- And still another professor made this remark, "Now that there are permapress shirts, dishwashers and garbage disposals, etc., women aren't needed."[101]

Although there is little question that a wide variety of textbooks and curricula are in one way or another sex biased and perpetuate discrimination, it is not clear precisely what strategy HEW will adopt to remedy this discrimination.

Some persons argue that HEW should take immediate and direct steps to eliminate this sort of stereotyping. However, there is a strong reluctance on the part of many government officials to intervene in issues involving textbooks and curricula. Both HEW and many educators fear that strong enforcement in this area might jeopardize the autonomy and academic freedom of local education agencies and institutions. They believe that such programmatic decisions should be made at the local, not the federal, level. In addition, they feel that the statutory mandate to overcome discrimination does not override the guarantees of free speech under the First Amendment.[102]

Others advocate the position that, although the government should not make such judgments directly, it should require institutions to have *internal* procedures and mechanisms for reviewing materials and curricula.[103] They think that the government should require institutions to establish internal mechanisms both to ensure that their curricula do not reflect discrimination and to resolve complaints alleging sex discrimination in the curricula. Advocates of this position maintain that, since it avoids having the federal government itself determine what is discriminatory, the First Amendment criticism mentioned earlier does not apply.

A third position is that the government should administratively delay any decision on this issue indefinitely. The probable eventual result of this tactic would be a suit by women's groups against HEW for not enforcing the provisions of Title IX. This would leave the resolution of this issue in the hands of the courts, which many people feel is a more appropriate vehicle for this decision than a government agency. Finally, some people argue that the government should overtly refuse to address the issue at all, perhaps even inviting a "sweetheart suit" to resolve the issue in the courts.[104]

Whatever strategy the government adopts, the issue of sex discrimination that is perpetuated by stereotyping in textbooks and curricula promises to be both controversial and unavoidable in the long run. A number of Title IX complaints in this area have already been filed.[105]

The Counseling of Students[106]

While there is little question that it is important for an institution to provide its students with unbiased counseling, there is considerable disagreement concerning how this might most appropriately be accomplished. Sex bias in counseling is perhaps even more difficult to identify and rectify than bias in textbooks or curricula. The arguments both for and against government intervention in counseling parallel those discussed in the preceeding section. Because of the subtle nature of discrimination in this area, the government is even less likely to intervene in counseling programs than in the area of textbooks and curricula.

Although counseling programs alone cannot take the blame or credit for the career and personal choices students make, they typically

mirror the attitudes of the institution towards women. Often sex bias is transmitted by well-meaning counselors who pass on stereotypes about men and women. They may be unaware of the growing body of research which is shedding new light on motivation and achievement in women. Often counselors are trained only to work with the "traditional" student, a label which often does not apply to older women returning to complete their education or women with child care and family responsibilities.[107]

No matter what stand HEW takes on direct (or indirect) intervention to alleviate sex bias in counseling, voluntary steps by schools would be consistent with both the spirit and letter of Title IX. For example, they might develop programs to train their counselors to be more sensitive to their own biases and those in the materials they use.

A similar issue is posed by bias in the tools that counselors might use: interest inventories, catalogs, tests, occupational materials, etc. These instruments can perpetuate stereotypes which limit the options of women and men. For example, in 1972 the American Personnel and Guidance Association passed a resolution calling for the revision of the widely-used Strong Vocational Interest Blank because it perpetuated discrimination against women. Although the APGA focused on the Strong, the pattern is consistent from one instrument to another.[108] It is likely that advocacy groups will use the momentum for change generated by Title IX to encourage schools, colleges and testing companies to reassess and revise counseling tools to assure that they do not perpetuate sex bias.

Single-Sex Courses and Programs[39]

A number of educational institutions at all levels have one or more courses which are open to one sex only. For example, many high schools offer home economics to females only and industrial arts to males only. In almost all instances such practices violate Title IX.[110] This prohibition has significance for a variety of courses: health, physical education, business, vocational, technical, industrial arts, home economics, music, as well as continuing and adult education courses.

Often the argument used for refusing to admit one sex or the other is the lack of duplicate facilities (such as bathrooms, dressing rooms or locker rooms). While bathroom and locker room space may have to be reallocated or shared by both sexes on an alternating basis (similar to the arrangements in airplanes and trains), the lack of duplicate facilities cannot be used as a reason for excluding one sex or the other. In any event, Title IX does not require women and men to undress in front of one another or to share the same bathroom at the same time.[111]

Because of different interest patterns between women and men, it is likely that some classes will continue to be made up either entirely or primarily of members of one sex. Women's groups are urging institutions to assure that classes or programs which enroll primarily men not receive preference over those which enroll primarily women in such areas as facilities and equipment, scheduling of classes or teacher competence.

Some women's groups are stressing that institutions be on guard not to offer courses which might have the effect of discriminating against women. For example, if an institution offered coaching instruction only for predominately male sports, it might leave itself vulnerable to criticism and charges of illegality.

Vocational Education Programs[112]

Many of the vocational education programs and courses in schools have been (and still are) sex segregated.[113] Tracking, as well as overt discrimination, will no doubt be strongly challenged under Title IX. Given that Title IX specifically prohibits sex discrimination in admissions to *all* vocational schools, including vocational high schools, these programs will come under strong legal (as well as moral) pressure to open their doors and programs to women and men on an equal basis. Indeed, because of both constitutional challenges and Title IX, a number of schools have already changed their policies and programs.

Women's Studies Programs and Courses[114]

It is reasonable to expect the number of women's studies courses and programs to increase as the press for equality for female students increases. There are now more than 4000 such courses in existence and they will no doubt continue to flourish.[115] These programs are likely

to be challenged under Title IX, however, if they exclude men.[116]

For a variety of reasons (including the reticence of the government to intervene in matters involving curricula), HEW is not likely to mandate that an institution have a women's studies program or women's studies courses. However, in the event that a Title IX complaint is filed, the government is likely to consider the existence of a women's studies program (or courses) as a sign of commitment to the education of women or as remedial or affirmative action.[117]

Women's Centers[118]

A number of colleges and some high schools have "women's centers" of one sort or another which provide supplementary services for the women in the institution.[119] It is well within the scope of Title IX to have a center focusing on women. However, under Title IX, it is not likely that a center could exclude men from using its services or participating in its activities. In general, this should not pose a threat to women's centers, because the few men who would use the center are likely to be sympathetic to women's issues.

Flexible Programs[120]

Opportunities to pursue a degree in a "nontraditional" manner or at a "nontraditional" pace are often especially important to women. Most college programs were originally designed to meet the needs of young males who had few, if any, home or parental responsibilities. Consequently, they are often not tailored to meet the needs of any of the so-called "nontraditional" students—women, minorities, older students, etc.

For a variety of reasons (including academic freedom and the First Amendment issues raised earlier), it is doubtful that HEW would require that an institution offer flexible programs. However, if these programs are especially beneficial to women, HEW is likely to regard their presence as a positive factor in evaluating an institution's compliance with Title IX.

Continuing Education Programs[121]

The lack of opportunity for older students to attend school is a factor which is likely to have a disproportionate impact on women. Because fewer qualified women than men go to college or graduate school, older women returning to college make up the largest single group of potential new students. Many institutions are finding that one of the easiest ways to increase their lagging enrollment without diluting academic standards is to develop programs and services which facilitate the reentry of these women into academia.

Although Title IX will probably not require an institution to provide such services, the government may look at the presence (or absence) in determining overall compliance with Title IX. Again, although many of these programs were specifically designed to meet the needs of women, it is doubtful whether men could be excluded from them under Title IX. In fact, a number of "Continuing Education for Women" programs already admit men.

Child Care Facilities[122]

Although the trend is towards more equal sharing of work both in the home and in the labor force, most women still bear the principal responsibility for child rearing. Therefore, the lack of child care facilities almost always affects female students (and employees) disproportionately. In assessing compliance with Title IX, HEW is likely to view the presence of such facilities as a positive indication of the institution's concern for women.

There are a number of unanswered questions concerning the specific implications of Title IX of the Education Amendments of 1972. There is no question, however, that educational institutions now have a clear and strong federal mandate to eliminate sex discrimination against students, as well as employees.

Footnotes

[1] The authors wish to express their appreciation to Jeffrey H. Orleans, formerly an attorney with the Department of Health, Education and Welfare and currently with the Equal Employment Opportunity Commission, for his helpful comments on drafts of the manuscript.

[2] Education Amendments of 1972 Sections 901–907, 20 U.S.C. Sections 1681–86 (1972).

[3] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

[4] In *Sweat:* v. *Painter*, 339 U.S. 629 (1950), the Supreme Court unanimously ordered that black students

be admitted to the University of Texas Law School. In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), the Supreme Court unanimously ordered that the black student-plaintiff "receive the same treatment at the hands of the state as students of other races." Similarly, in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Supreme Court found that "separate educational facilities [on the basis of race] are inherently unequal." In contrast, six years after the *Brown* decision, in *Allred v. Huston*, 336 S.W. 2d 251 (Tex. Civ. App., 1960), cert. denied, 364 U.S. 517 (1960), the Supreme Court let stand a lower court decision prohibiting a woman from being admitted to Texas A and M (then an all-male institution) to pursue a course of study which was not offered at any other publicly supported institution. Similarly, in *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) *aff'd. mem.*, 401 U.S. 951 (1971), the Supreme Court affirmed a lower court decision upholding the right of a state to maintain a women's college. In *Kirstein v. Rector & Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970), however, women were granted admission to the previously all-male college of the University of Virginia. For a general review, see Shaman, "College Admission Policies Based on Sex and the Equal Protection Clause," 20 *Buffalo L. Rev.* 609 (1971). No cases involving sex discrimination against students in educational institutions in areas other than admissions have been heard by the Supreme Court.

5 Public Health Service Act, Section 799a and Section 845, 42 U.S.C. Section 295h-9 and Section 298b-2 (as added by the Comprehensive Health Manpower Training and Nurse Training Acts of 1971). The Act covers, but is not limited to, schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel and nursing. In addition, regulations issued in June 1972 (45 CFR Part 83) by the Secretary of Health, Education and Welfare specify that all entities (including hospitals) applying for awards under Titles VII and VIII of the Public Health Service Act are subject to the nondiscrimination requirements.

6 As of July 1974, final regulations for these amendments had not been issued. Draft regulations, proposed 45 CFR Part 83, were published in the *Federal Register* on September 20, 1973 (38 *Fed. Reg.* 26, 284-89).

7 The legislative history of Sections 799a and 845 of the Public Health Service Act, 42 U.S.C. Section 295h-9 and Section 298b-2, is found at 117 Cong. Rec. 23,222-64, 26,119-22, 25,181-86 (1971). It would be inconsistent with the intent of this legislation to admit students in a nondiscriminatory manner to a program and subsequently treat them discriminatorily. In addition, sex discrimination against students already enrolled in a program might significantly discourage qualified students from applying because of their sex.

8 Education Amendments of 1972 Sections 901-907, 20 U.S.C. Sections 1681-86 (1972). As of July 1974, final implementing regulations for Title IX had not been issued. For a copy of the proposed regulations (45 C.F.R. Part 86), see 39 *Fed. Reg.* 22, 228-40 (June 20, 1974) or write to the Director, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201. The comment period for the proposed regulations ends October 10, 1974.

9 Federal financial assistance includes, but is not limited to, a grant or loan of federal funds (including funds for construction or repair of buildings or facilities), scholarships, loans, grants, wages or other funds extended to an institution for payment to, or on behalf of, students, or scholarships, loans, grants, wages or other funds extended directly to a student for payment to an institution; a grant of federal real or personal property, including surplus property; provision of the services of federal personnel; or the sale or lease of federal property at a nominal cost.

10 For an excellent section-by-section analysis of Title IX and a suggested legal framework on which to evaluate separate or different treatment of the sexes in educational activities, see Alexandra Polycrates Busek and Jeffrey M. Orleans, "Sex Discrimination: A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972," 6 *Conn. L. Rev.* 1 (1973) (hereinafter cited as Busek and Orleans).

11 Education Amendments of 1972 Section 901(a), 20 U.S.C. Section 1681 (1972).

12 Specifically, Title IV of the 1964 Civil Rights Act was amended to include sex as a category of discrimination in school assignment (in determining whether the U.S. Attorney General may bring action upon receiving a complaint of discrimination involving admission or continued attendance at a public institution). Title IX of the 1964 Act was amended to include sex as a category of discrimination under which the Attorney General may intervene on an action commenced in any federal court seeking relief from denial of equal protection of the laws.

13 Also, coverage under the Fair Labor Standards Act was extended to individuals employed in preschools and school kindergartens.

14 As of July 1974, no regulations had been issued to enforce this provision.

15 Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (1964).

16 (1) Certain schools are exempt from Title IX, while there are no such exemptions under Title VI. (2) Title VI has certain exemptions from its coverage of employment discrimination, while Title IX does not. (3) Title IX is restricted to federally assisted education programs, while Title VI covers all federally assisted programs.

17 The obligation of an institution to comply with the provisions of Title IX is in no way obviated or alleviated by any state or local law or other requirement which allows or requires discrimination. Similarly, rules or regulations of any organization, club or athletic league or association do not allow an institution's Title IX obligations. See Subpart A, Section 86.6 of the proposed regulations.

BEST COPY AVAILABLE

[illegible] If an educational institution is composed of more than one school, college or department which are administratively separate units, admissions to each unit are viewed separately under Title IX. See also sections pertaining to Title IX rights.

[illegible] The reader is reminded that there are no similar exemptions under the amendments to the PHSA for federally financed health training programs subject to those provisions.

[illegible] Since the passage of Title IX, the Maritime Administration has changed its admission policies so that women are now admitted to the U.S. Merchant Marine Academy at Kings Point, New York.

[illegible] Although HEW attempts to keep the names of complainants confidential, women are increasingly filing complaints through third parties or advocacy groups because they fear harassment. Although such harassment is prohibited, it is often very subtle and consequently difficult to document.

[illegible] 20 U.S. 1682.

[illegible] These procedures are described in greater detail in the final implementing regulations for Title IX. See Subpart F of the proposed regulations.

[illegible] This is consistent with the regulations to Title VI of the 1964 Civil Rights Act as amended in July 1973. 45 CFR Part 80.

[illegible] Title IX, 20 U.S.C. 1681(a), provides that: Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

[illegible] The Supreme Court has recently avoided the issue of deciding whether, in the absence of proven discrimination, the Equal Protection clause of the Fourteenth Amendment permits an institution to use different criteria for admitting white and minority students. See DeFunis v. Odegaard, 94 S.Ct. 1704 (1974).

[illegible] In a number of employment cases, the courts have ruled that individuals must be considered on the basis of their individual capabilities, not on the basis of characteristics attributed to the group to which they belong. See, for example, Weeks v. Southern Bell Telephone and Telegraph, 408 F.2d 228 (5th Cir. 1969) and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Photo by Bob Goldstein

[illegible]

[illegible]

[illegible]

Chapter 622:

One State's Mandate

and guidance services; the physical education program; the athletics program; instructional materials; and any other areas in which differences are found to exist.[29]

The general interest in these committees, but particularly the willingness of school administrators to participate, is traceable in large part to the existence of Chapter 622. A local system is concerned with satisfying its *own* community with respect to the elimination of discriminatory practices, and it makes obvious sense to involve the community in the initial process of responding to the legislative mandate. This consequence strikes us as being one of the most positive products of the legislation.

A similar interest in outside viewpoints has been shown in other responses of educators to Chapter 622. They want to know what the supporters of the legislation were seeking to achieve. This is a normal and sensible reaction on their part, and one which provides a realistic opportunity for developing a cooperative relationship between the administrators of the educational system and the group seeking to change the schools. Each side has something to offer. In the case of Chapter 622, an ongoing process has resulted, with the administrators and the advocates working together toward agreement upon the scope of the law and the responses which should be made to it.

State Response and Involvement

Much of the impact which Chapter 622 has had upon Massachusetts schools and educators is directly due to the efforts of volunteers who worked to see that the law was implemented. These people gave advice and guidance to individuals who wanted to avail themselves of the protections of the law. They served as catalysts in the process of creating new groups of advocates and talked about Chapter 622 to anyone who would listen. They aroused local school committees, PTA's, teacher groups and Leagues of Women Voters. And they maintained continuous pressure upon the state agencies which could act in ways which would expand the potential of Chapter 622.

The most desirable way the state could respond appeared to be an active acceptance of the responsibility for oversight of the law.[30] This would require the state to assume the role of a compliance officer, defining the type of behavior which would conform with the law, assisting local school systems in their efforts to comply and imposing sanctions when voluntary compliance could not be obtained. Progress has been made toward this goal. New groups of people have been involved in the implementation of Chapter 622, adding further dimensions and perspectives to the law which might not have been achieved otherwise.

State Guidelines

In Massachusetts a concerted and persistent effort[31] to make the state acknowledge its duty to provide guidance on Chapter 622 to the local school systems finally produced an Ad Hoc Committee whose members, appointed by the Commissioner of Education, were asked to "develop policy guidelines for the implementation and enforcement of this legislation."[32]

The committee was composed of proponents of the law, representatives of groups affected by the law, students, teachers and local and state administrators. The guidelines which were developed by this committee took the natural step of moving beyond the guarantee of access in Chapter 622 to considering the kinds of intentional and unintentional barriers to access which can exist in an educational setting. The proposed guidelines described the ways of removing these barriers. In addition they called for internal monitoring procedures in an effort to ensure that deviations from desired norms would not pass unnoticed. The topics covered by the committee guidelines[33] included admissions policies, entry into courses, guidance practices, course content and materials used, and extracurricular and athletic activities.

In March 1974, the Commonwealth's Board of Education agreed to accept and promulgate the guidelines drafted by the Ad Hoc Committee, but with one major change. The committee guidelines were designed to serve the functions of advising local school systems of the law and the terms of appropriate compliance with it, and of giving notice to the local agencies that the Board of Education was requiring and would enforce compliance with the legislative mandate contained in Chapter 622. The Board chose to accept the guidelines only for their *advisory* use, and voted to

delay for another year consideration of enforcement mechanisms to operate within the Department of Education.

As might be expected, the original proponent groups raised strong objections to the nonmandatory character of the Board's guidelines (which the Board chose to call Recommendations). More surprisingly, new voices joined in, most notably those of some directors of public school athletic programs. These people saw the strong committee guidelines as a tool to convince conservative school committees that increased athletic expenditures were necessary. The original form of the guideline on athletics set as a goal the equalization of expenditures "for male and female students, proportionate to their membership in the student body" in each category of athletic activity.[34] Because it is unlikely that a town is going to reduce the budget for boys' activities, assuming a constant level of participation, the probable consequence of an equalization requirement will be a larger athletic budget, with the new money going to girls' sports.

Another objector to the nonmandatory Recommendations was the Massachusetts Commission Against Discrimination, which identified certain areas in which the Recommendations appeared to conflict with existing anti-discrimination laws administered by the agency. Teachers, administrators and guidance counselors within individual school systems also expressed reservations about the diminished impact which recommendations would have and noted the possibility of confusion. Some members of the Ad Hoc Committee filed a formal objection to the Board's action. Despite all this activity, as of this writing, the guidelines remain Recommendations and continue to be phrased in nonmandatory terms.

This disappointment is somewhat offset by the fringe benefits of the controversy: the event has served to swell the ranks of proponents of Chapter 622 and has encouraged the spread of information regarding the implications of the law and its accompanying individual right to sue. Significant public attention has focused on the Board of Education's commitment to review in a year the operation of the Recommendations and consider then whether to convert them into regulations.

Internal advances are also being made in the Department of Education as a result of Chapter 622 and the momentum generated by the work of the Ad Hoc Committee. The goal is a system for providing advice and assistance to local school systems concerned with providing equal educational opportunities for boys and girls. Funds for two staff positions have been included in the Department of Education budget for fiscal 1975. One person already at work is surveying system-wide practices and designing methods for initiating change. However, it still will be necessary to arouse a school system's interest in taking advantage of the help being offered by the state, and thus it still will be necessary for students and parents to remain actively interested in whether and how the law is being implemented.

Within the two years following its enactment then, Chapter 622 has been put to good use by public school students and parents. Appropriate institutional responses are occurring as well. Commitment to furthering the policies which underlie the law has been engendered to a degree that makes us confident that Chapter 622 will continue to make a difference in the operation of the public schools of the Commonwealth of Massachusetts. There is one further question to answer: what results has Chapter 622 achieved in vocational education in Massachusetts?

Vocational Education

The ultimate goal of the drafters of Chapter 622—to expand occupational opportunities for women by expanding training opportunities for girls—still remains more of a hope than a reality. There are indications that vocational education practices are becoming less rigid, but not all vocational educators have recognized and publicized the new options which the law makes available to students interested in being educated for employment.[35] One new regional vocational-technical school, scheduled to open in fall 1974, is making active efforts to attract girls. Its facilities are planned with the expectation that at least forty percent of its enrollment will be female, a figure which is comparable to the percentage of females in the area work force.[36]

Making vocational programs available to girls, however, is only the beginning. It is here that the affirmative efforts called for by the Ad Hoc Committee are truly needed. Girls who are inter-

Photo by Roz Gerstein

BEST COPY AVAILABLE

ested in preparing themselves for jobs need to know that new fields are now open to them and that these opportunities are challenging, satisfying, remunerative and well within their capabilities. Beyond the tasks of specific guidance as to occupational choice is a great need that general information be provided to adolescent girls concerning the economic facts of life and what a female's realistic expectations about financial support ought to be.

Broadening Education Options

The passage of Chapter 622 has turned our attention[37] to the possibility of varying the scheduling of vocational education for females, since it currently appears to be out of phase with the actual needs of women in varying economic and family situations. We are thinking that publicly-supported occupational training for women when they need it—that is, when they are ready to permanently enter the labor force—is an option which needs greater consideration and exploration. The fact that we are now aware of the potential for changing the vocational education structure in order to better serve the needs of girls and women (and we are bringing this to the attention of others) illustrates another way in which Chapter 622 is having a continuous and ever-widening impact upon education in the state.

The consequences which Chapter 622 has had for vocational education in Massachusetts confirm our conclusion that legislation of this type

43

ought to be viewed, and valued, as a first step in a long and expanding process. Undoubtedly an access law is an essential beginning point. Those who wish to propose an access law should recognize that its major function will be to stimulate a great number and variety of spinoff activities. These efforts in turn will lead to a closer scrutiny of the educational structure itself to see whether it is equally well suited to the needs of both sexes. A formulation which permits individual enforcement seems to us most likely to produce these results. If an individual enforcement law can be used to generate a statewide agency response, the development of basic policies will proceed more quickly and the law will be likely to have more impact sooner. Even without the expanded implications, however, legislation such as Chapter 622 contains in itself the potential to produce real change in the schools, and to do so on behalf of those with unfulfilled and pressing needs.

Footnotes

[1] Mass. Acts & Resolves, 1971, ch. 622, amending Mass. Gen. Laws ch. 76, Sections 5 and 16.

[2] The full text of the law, following the 1971 amendment, protects against discrimination "on account of race, sex, color, religion or national origin." Both sex and national origin were added to the list of protected characteristics by the 1971 legislation.

[3] The idea for the meeting originated with author Healy and Martha Davis, both of whom were then working at Massachusetts Law Reform Institute, an OEO-sponsored agency responsible for statewide legal services projects.

[4] *1968 Statistics on Boston's Population*, Action for Boston Community Development, Inc., Boston, Mass.

[5] Mass. Gen. Laws ch. 76.

[6] This provision, which appears as Section 5 of the chapter, was probably intended to fix and limit rights rather than to extend them; that is, its purpose is to identify the pupils which the local municipality must provide educational services for, and by doing so, to make it clear that no one outside the established geographical boundaries has any entitlement.

[7] Mass. Acts & Resolves, 1855, ch. 256.

[8] Mass. Gen. Laws ch. 76, Section 16.

[9] In only two of the fully reported cases arising under Section 16 of Chapter 76 has the plaintiff prevailed. In the first of these, *Mercer v. City of Lawrence*, 181 Mass. 127, 63 N.E. 400 (1902); 186 Mass. 456, 72 N.E. 91 (1904), a student was accused by the principal of the high school of inciting other students to write articles for a local newspaper which were critical of the principal. The newspaper was published by the student's father. Eventually the student was expelled and an action was brought to recover damages. The jury found in the student's favor but the Supreme Judicial Court ordered a new trial on the ground that the trial judge erroneously refused to instruct the jury to disregard evidence of the costs of attending school elsewhere (since the students did not show these to be personally incurred by him). At the second trial the jury returned a verdict for the sum of $750 and this time defendant's exceptions were overruled on appeal. *Carr v. Inhabitants of Dighton*, 235 Mass. 304, 118 N.E. 125 (1918), involved suspension of three children in a family on account of head lice, followed by an unsuccessful effort by their parent to obtain a hearing. The jury found for the plaintiffs, apparently concluding on the particular facts that the exclusion from school was not made in good faith, and awarded each child $100. The verdicts were upheld on appeal.

[10] A variation of the bathroom argument was made in the subsequent legislative session when bills designed to save all-male Boston Latin School from Chapter 622 were being considered. The contention was that the Latin School building couldn't accommodate females because there weren't enough of the "right kind" of facilities. See note 28 infra.

[11] In 1971 the 240-member Massachusetts House of Representatives (the largest in the country) contained four women.

[12] Of the schools responding, 19 reported themselves as admitting only boys and 4 as admitting only girls. 57 of the responding schools refused to permit boys to take home economics courses, 52 of whom refused to permit girls to take shop courses. 86 of the 117 coeducational schools furnishing information to the survey reported that they provided more athletic opportunities for boys than for girls, whereas 9 of those had more athletic opportunities for girls than for boys.

[13] Testimony of Virginia Healy before the Joint Committee on Education of the Massachusetts Legislature, March 22, 1971.

[14] Both of Boston's major newspapers reported the Governor's action in signing the Bill into law. The Herald report included a statement from Speaker Barting's office that the legislation was designed primarily to open to girls vocational opportunities traditionally limited to boys, followed by the Associate Commissioner for Vocational Education's comment that he didn't expect the law to have a major impact since "it will simply confirm what many schools are already doing." Boston Herald, Aug. 10, 1971.

[15] The corresponding statutory provision is found in Mass. Gen. Laws ch. 15, section 1G, the section delineating the responsibilities of the State Board of Education. One paragraph of that section reads:

> The board shall see to it that all school committees comply with all laws relating to the operation of the public schools and in the event of noncompliance the commissioner of education shall refer all such cases

to the attorney general of the common wealth for appropriate action to obtain compliance.

A second string to the Board's bow is provided by an earlier paragraph in the same section:

> The board may withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the location of the public schools or any regulation of said board authorized in this section.

State educational agency enforcement does appear to be an appropriate means of obtaining compliance with nationwide policies on the part of operating educational systems which are subject to local control. Mass. Gen Laws ch. 40, Section 1 requires every town at its annual meeting to elect specified town officers, including members of the school committee. The duties of a school committee, as prescribed by Mass. Gen. Laws ch. 71, Section 37, are "to have general charge of all the public schools."

[16] Mass. Gen. Laws ch. 15, Section 1G, quoted in note 15 supra.

[17] The Massachusetts Board of Education has used its withholding power in its efforts to enforce the state's racial imbalance law. *School Committee of Springfield v. Bd. of Education*, Mass. Adv. Sh. 1540 (1972), *rev'd sub nom. School Committee of Boston v. Bd. of Education*, Mass. Adv. Sh. 181 (1973) at 181-182.

[18] For example, the 1972 school budget for the Town of Lexington called for a total outlay of $11,919,867. Actual expenditures for the year amounted to $11,252,991.00. State reimbursements came to $2,311,887.82, or approximately 20% of the total. "Let 80% of the cost of its schools was being paid by the town's inhabitants through real estate taxes.

[19] These involved a Board mandate that kindergartens be operated in all communities and a legislated requirement that public schools make lunches available to their students.

[20] Limited waivers of both the kindergarten requirement and the school lunch requirement were given upon an adequate showing of hardship.

[21] An apparent example of this is the requirement, frequently alluded to by physical education teachers but unheeded otherwise, that "[p]hysical education shall be carried on daily for all pupils in the public schools." Mass. Gen. Laws ch. 71, Section 3.

[22] No agency of this type exists in Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Dakota, South Carolina or Virginia. Tennessee has a commission which has no enforcement powers and Florida, North Carolina and Texas have agencies with extremely limited jurisdictions.

[23] The Massachusetts legislature is currently considering a bill (HB 2305) to give the Massachusetts Commission Against Discrimination broader jurisdiction over complaints of discrimination in the public schools which will be concurrent with the jurisdiction of the courts to hear Chapter 622 complaints. The MCAD is itself actively seeking this responsibility, and personnel changes in the agency since 1970 (not the least of which is the appointment of author Healy as a Commissioner) make it probable that it can effectively assume additional powers, if given, and can do so promptly and competently exercised.

[24] See the paragraphs of Mass. Gen. Laws ch. 15, Section 1G quoted in note 15 supra.

[25] This is the provision toward which great enactment criticism in Chapter 622 appear to be moving, as suggested infra.

[26] The [illegible] privately circulated report on sexism and public school policies and practices appears to have been *Dick and Jane as Victims*, a study of children's readers done by women in Princeton, New Jersey (who later organized themselves as Women on Words and Images), first published in 1972. Studies of school systems were done that same year in Ann Arbor ("An Action Proposal to Eliminate Sex Discrimination in the Ann Arbor Public Schools," March 1972) and New York City ("Report on Sex Bias in the Public Schools"). Following these, a number of women's groups, teacher groups and individuals came out with collections of materials, studies and action plans for eliminating sex role stereotyping in the schools. A good listing of these is found in *Sexism in Education* (3d ed., Sept. 25, 1972), Emmy Willard Tyler, Focus on Education, University Station Box No. 14229, Minneapolis, Minnesota 55414. (See also "Kalamazoo: A Model for Change" by Carol Ahlum in this issue.)

[27] There have been occasions in which considerable pressure has been required in order to move recalcitrant school officials as well as assistance in which the victory won has been somewhat hollow. An example of the latter occurred with the Natick, Massachusetts school system, when the principal of a junior high school, following a girl's complaint about nonaccess to a shop course, agreed to admit her and to inform all the girls in her class about the existence of these Chapter 622 mandated opportunities. He did so by means of the following bulletin, quoted here in full:

WILSON JUNIOR HIGH SCHOOL
NATICK, MASSACHUSETTS 01760

January 31, 1973

Dear Parents,

Your daughter has requested to take Woodworking and Art Metal this second semester instead of Home Economics. Although there is already a class of boys taking the industrial arts course, we will attempt to put in a few girls.

We want you to realize that your daughter will be given the same course as the boys. It will involve learning the various skills needed in working with wood and with metal. Some power machines will also be used.

We have not had seventh grade girls in this class before and we want your full understanding of what is

[illegible] If you formally feel that your daughter will benefit most from this class in Woodworking and Art [illegible] than in Home Economics, please check number "1" below. If you want your daughter to stay in Home Economics, check number "2".

Yours truly,

Harold B. Lovejoy
Principal

[illegible] H.S. and Jr. H. Schs. Lvg.

Enrollment Classification 1972

1. I understand that my daughter will have to follow the same course as the boys. I agree that she should take Woodworking and Art Shop.
2. I have decided that my daughter should stay in Home Economics.

Signature of Parent

[illegible] Until September 1972, only boys were permitted to attend Boston Latin School, the city school system's prize school for the academically talented. Girls with similar abilities were educated at Girls' Latin School. The Boston Latin building can accommodate 2,000 students while the Girls' Latin facility is sufficient for only 1,200 students, and thus cuts over a fixed number of girls each from the educational opportunity. Since girls did as well, or better, on the entrance exam for the Latin Schools, the relative number of female admissions to the program was obtained by requiring girls to achieve a higher exam score than boys. For the entire term of the Latin Schools, and a ruling as to the constitutionality of [illegible] practices, see Bray v. Lee, 337 F. Supp. 934, 937 (D. Mass. 1972), in which the Court held that "the use of separate and different standards to evaluate the examination results to determine the admissibility of boys and girls to the Boston Latin schools constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment, the gravamen of which is an arbitrary geographical dispersion between the sexes. . . . It can thus [illegible] that on the basis of the record of this case future students seeking admission to Boston Latin School have been illegally discriminated against solely because of their sex, and that this discrimination has denied them their constitutional right to an education equal to that afforded to male students at the Latin School."

The Bray decision doesn't touch the question of whether Boston could maintain the Latin Schools as single-sex schools if the admissions policies were the same for both sexes. Chapter 622, which became effective while Bray was pending, would prohibit this solution because of the inequities between the physical facilities and the programs offered at the two schools. Recognizing this, the supporters of an all-male Boston Latin mounted a vigorous campaign to exempt the Latin Schools from the operation of Chapter 622. In the 1972 legislature a number of bills intended to accomplish this were introduced. Every hearing was the one sponsored by the Boston Student Advisory Council, which proposed to add a "grandfather clause" providing that "[a]ny school which in January 1st, nineteen hundred and seventy one, was operated as a school segregated on the basis of sex may continue to operate on such basis." The battle over these bills was a long and bitter one. The headmaster of Boston Latin proclaimed an appeal to the parents of the nation to communicate their support for the campaign to the Chairman of the Joint Education Committee, writing there, "We're at Armageddon. The future of the Boston Latin School is in your hands." Although the Education Committee would have just rejected the exemption bill, [illegible] and unfavorably, the House exempted the adverse report by a vote of 126 to 76. Fortunately, the Senate failed to accept. Even then the matter was not over. Under the pledge of Rules and legislative [illegible], only Boston was not open. If Boston's City Council and Mayor would approve. Following a stormy City Council hearing, a bill was approved which would permit the Latin Schools to continue separately upon a showing of equality in admissions standards and in the quality of the educational programs, and proof of adequately sound reasons for the segregation. This effort was not approved by Mayor Kevin White, an action which was tantamount to a veto. As a result girls entered the schools at Boston Latin School in September 1972.

[1] Minutes, Lexington School Committee, March 14, 1974, on file at the School Administration Building, Lexington, Massachusetts.

[2] See note 15 supra.

[3] Although a few individuals had suggested participation on this course since Chapter 622's passage, modest impetus was provided by a statewide conference on Chapter 622 held March 28, 1973. The idea for the conference came from Mayor Kevin White's Office of Human Rights. Mayor wrote for assisting in a mailing list to be given to Donaldina Pindyck, a member of the Office for Human Rights staff and presently the Chairperson of the Ad Hoc Committee described infra at note 20. A central recommendation of the conference, followed up on by its organizers, was that guidelines for Chapter 622 should be issued by the state.

[4] Letter to interested participants from Gregory J. Anrig, Commissioner of Education, dated June 22, 1973.

[5] "Recommendations Pertaining to Access to Equal Educational Opportunity," March 11, 1974, prepared by the Ad Hoc Committee for Chapter 622, and considered by the Massachusetts Board of Education at its March 28, 1974 meeting.

[6] Id. Paragraph B.c.

[7] Much of the recruitment material used by cooking schools has not been revised, and in some instances the course listings continue to be labeled "for boys," "for girls" or "for boys and girls."

[8] Greater Lowell Regional Vocational Technical High School, located in Lowell, Massachusetts.

[9] We have received a grant from the National Institute of Education to produce a case history of Chapter 622 as an effort to address improved education in Massachusetts through the use of the legislative process.

Kalamazoo:

A Model for Change

by Carol Wilson

Music Tapes, Houghton Mifflin Reading Program. Copyright © 1991 by Houghton Mifflin Company. Used by permission.

Music Tapes, Houghton Mifflin Reading Program. Copyright © 1991 by Houghton Mifflin Company. Used by permission.

Source Words

Notes and Comments

legislature had previously established deadlines which were not fulfilled or which were delayed:

> In the light of the irregular and delayed implementation of legislation in the essential area of education for handicapped children, we are of the view that this case is not moot. The mere enactment of legislation without actual implementation does not render substantial legal questions moot.

Second, the court relied upon "plaintiffs' claims for compensatory relief for past exclusions of handicapped children from school programs." Thus, plaintiffs sought "relief beyond that mandated in the [state law]."

For related cases, see *Harrison* v. *Michigan*, 350 F. Supp. 846 (E.D. Mich., 1972) (case moot), and *Panitch* v. *Wisconsin*, C.A. No. 72-C-461 (E.D. Wis., Feb. 19, 1974) (rejecting mootness claim).

CORPORAL PUNISHMENT

STUDENT'S AND PARENT'S CONSTITUTIONAL RIGHTS RECOGNIZED IN VIRGINIA CORPORAL PUNISHMENT CASE

Mahanes v. Hall, C.A. No. 304-73-R (E.D.Va., May 16, 1974).

The rights of both students and parents in the administration of corporal punishment have gained significant recognition in a Virginia federal district court decision.

While stating that there was no indication that corporal punishment served any useful purpose in the learning process or in improving discipline, Judge Robert R. Mehrige, Jr. held that the Virginia statute authorizing its use did not on its face violate the Eighth Amendment prohibition against cruel and unusual punishment. Nevertheless, the court declared that the ten-year-old student's right to due process under the Fourteenth Amendment was denied by the absence of notice and a fair hearing prior to the administration of the punishment. The decision thus marks the first time that a student's constitutional rights have been recognized in a corporal punishment case.

The Judge further held that the failure to obtain consent for the punishment from the student's mother violated her parental rights. In requiring actual consent, the ruling goes beyond the opinion in *Glaser v. Marietta*, 351 F.Supp. 555 (W.D.Pa. 1972), which held that corporal punishment cannot be administered when a parent has specifically requested that it not be used.

A jury awarded the student $200 in damages. The judge added $10 for the student's mother.

Attorney for the plaintiffs is Sy DuBow, American Civil Liberties Union of Virginia Foundation, Suite 402, Heritage Building, 10th and Main Streets, Richmond, Virginia 23219 (804) 649-3415.

USE OF CORPORAL PUNISHMENT MAY BE CRUEL AND UNUSUAL

Bramlet v. *Wilson*, 495 F.2d 714 (8th Cir. 1974).

In another corporal punishment case, a district court's granting of a motion to dismiss the complaint was reversed by the Eighth Circuit.

Plaintiffs allege that corporal punishment as administered in Gentry, Arkansas public schools is cruel and unusual punishment and, as in *Mahanes*, that it is administered in violation of due process and parental constitutional rights.

Noting that dismissal is proper only when plaintiffs allegations present on their face some insuperable bar to relief, the court of appeals stated that infliction of excessive amounts of corporal punishment may constitute cruel and unusual punishment. It was therefore unnecessary to determine whether corporal punishment is unconstitutional per se in order to find that plaintiffs had stated a claim upon which relief could be granted. Further, the court held that the school superintendant and individual school board members are proper parties under the Civil Rights Act (42 U.S.C. Sec. 1983) and can be sued for allegedly instituting and maintaining a policy which fosters the administering of cruel and unusual punishment.

Plaintiffs are represented by W. Rudy Moore, Wade, McAllister, Wade and Burke, P.O. Box 1000, Fayetteville, Arkansas 72701 (501) 521-1411.

BEST COPY AVAILABLE

STUDENT RIGHTS

STUDENT CANNOT BE PUNISHED FOR MISCONDUCT OF PARENT

St. Ann v. Palisi, 495 F. 2d 423 (5th Cir. 1974).

The Fifth U.S. Circuit Court of Appeals has found a school regulation permitting students to be punished for the misconduct of their parents towards teachers unconstitutional, on substantive due process grounds. The case involved a mother who struck an assistant principal during an argument about the three-day suspension of her son. The next day, both of her children were suspended pursuant to the Parish School Board Regulation XIX which provided, *inter alia*:

> Should the principal or teacher be called to account or reproved in an offensive manner . . . by a parent or guardian, the child or ward of such parent or guardian shall, by reason of such conduct, be liable to suspension or other punishment. Said suspension or other punishment shall not be made until after the parent or guardian has refused to make proper amends.

The principal recommended that the suspensions be for an indefinite period.

Ms. St. Ann sued in federal court for an injunction against implementation of Regulation XIX and monetary damages. The district court dismissed the suit, upholding the regulation as within the school's discretion in order to maintain discipline. In a 2–1 decision, the court of appeals vacated the dismissal order as to the minor children (but affirmed as to individual claims by Ms. St. Ann) and remanded the case for a determination on monetary damages.

Photo by Deborah Feingold

The court held that the regulation impinged on "a fundamental element in the American scheme of liberty," the traditional notion that one is punished only for his own acts or omissions and not someone else's. While this concept is not mentioned in the Constitution, the court found support for its position in various Supreme Court cases.[1] The court ruled that the infringement could only be justified by a weighty showing. "Having established a significant encroachment upon a basic element of due process, the state, in order to justify this encroachment, must satisfy a *substantial* burden." [495 F. 2d at 423; emphasis in original; footnote omitted.]

The court concluded that the system failed to satisfy this standard. Although school officials argued that the regulation promoted discipline and decorum in the schools, the court observed that the board's repeal of the regulation after the judgment below indicated that it was "not completely indispensable . . . ." The court stressed the "existence of reasonable alternative means" for fulfilling the system's policy objective.

> Non-students upon school property can be controlled or excluded by local regulations. Persistent violators may be enjoined or prosecuted under state law. Those who attack school officials are subject to state civil and criminal penalties just as Mrs. St. Ann was in the instant altercation. These are traditional and effective remedies for school officials who are disturbed by non-students. All these remedies place restraint on the offending individuals, not on the innocent members of the family. School officials can be relatively certain that news of such remedies will reach the school children, and perhaps the children will realize that the remedy did not arise from the arbitrary use of power but from the

BEST COPY AVAILABLE

traditional precepts of justice in our society [495 F. 2d at 428].[2]

Judge Roney dissented on several grounds. He observed that civil law is "replete with the concept of vicarious liability;" that the transfers were not "punishment in a criminal vein," that the rule was a rational means of promoting discipline; and that it was unlikely that a teacher could work effectively with a student following such an incident.

[1] *Scales* v. *U.S.*, 367 U.S. 203 (1961). (Only "active" members having a guilty knowledge and intent are criminally responsible for the illegal advocacy of their organization); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). (Disallowed a loyalty oath which did not discriminate between innocent and knowing membership in subversive organizations); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966). ("A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."); *Levy* v. *Louisiana*, 391 U.S. 68 (1968). (It is invidious discrimination to deny illegitimate children the right to recover for the wrongful death of their mother "when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother"); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). (Illegitimate children can recover under workman's compensation laws; "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing").

[2] The court stated that even under a rationality standard, the constitutionality of the regulation was "a matter of serious concern."

Photo by Roz Gerstein

Judicial Standards for Determining Sex Discrimination

by Paul Wickstein

School policies often result in differing treatment of males and females. Sometimes the difference is clearly intended, as when homemaking is required for females and shop for males. Often, however, such intention is either lacking or unclear, as when a school refuses financial aid to its part-time students, the majority of whom are women. In litigating claims of sex discrimination, an understanding of the analytical framework and standards of proof likely to be utilized by courts is helpful, whether proceeding under the equal protection clause of the Fourteenth Amendment or under Title IX of the 1972 Education Amendments (42 U.S.C. Sec. 1681 *et seq.*), which bans sex discrimination in education.[1]

A. Title IX[2]

By forbidding discrimination on the basis of sex in any educational program receiving federal financial assistance, the statutory language of Title IX offers a more specific recognition of the illegality of sex discrimination than the words of the equal protection clause. The regulations proposed by HEW pursuant to the Act (39 Fed. Reg. 22227-40 (June 20, 1974)) go further in spelling out the nature of the prohibited discrimination by addressing specific activities such as admissions and employment. When validly issued and approved, these regulations will have the force and effect of law, and violations of the regulations will be treated by courts as violations of the statute.[3]

Recent precedent can be found in *Lau v. Nichols*, 94 S.Ct. 786 (1974). The Supreme Court reached its finding that the San Francisco school system's failure to provide English language instruction to students of Chinese ancestry who do not speak English was a violation of Title VI of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000d *et seq.*), which bans racial discrimination in programs receiving federal financial assistance. The Court did so by determining that the lack of instruction violated HEW's implementing regulations. The Title IX statute and regulations should also have some effect on judicial interpretation of sex discrimination claims under the equal protection clause.[4]

Some vagueness remains, however, because in the statute and throughout the proposed regulations the forbidden action is cast as discrimination "on the basis of sex." Does this language invalidate any policy which results in different treatment? Must there be, instead, proof of actual intent to discriminate? Or, is there some appropriate standard which is intermediate between these two approaches?[5]

In interpreting "on the basis of sex," particularly in terms of applicability to policies which seem neutral on their face but which have a disproportionate effect on one sex, lawyers can look to employment cases under Title VII of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000e *et seq.*). Title VII similarly uses the phrases "because of" and "on the basis of." Most courts have held that once a plaintiff makes a *prima facie* showing that the law or policy produces a statistically significant disparity of results between racial, religious, sexual or ethnic groups, the burden shifts to the defendant to demonstrate that the law or policy is related to actual job requirements. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); *United States v. Jacksonville Terminal Co.*, 451

Paul Wickstein is a Research Associate at the Center for Law and Education.

F.2d 416, 455-57 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). While these cases all involved racial discrimination, the same standards are applicable under Title VII to sexual discrimination. Leopert v. New York Telephone Co., 358 F. Supp. 359 (S.D. N.Y. 1973). Further, in striking down a no-marriage rule for stewardesses as not being a bona fide occupational qualification, the court in Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971), stated:

> The scope of Section 703(a)(1) is not confined to explicit discrimination based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Even with this framework, any evidence of discriminatory intent clearly strengthens a case. See [illegible] v. Columbus Municipal School District, 467 F.2d 1112, 1113-15 (5th Cir. 1972). The [illegible] such intent should not be confined to facial statements of prejudice but should seek out the assumptions underlying school policies.[6]

Another approach is to look to the standards applicable to Title VI of the 1964 Civil Rights Act, the forerunner of Title IX, which forbids discrimination "on the ground of" race, color or national origin. The test under Title VI has been held to be the same as the test under equal protection analysis. Ward v. Wineland, 314 F. Supp. 1225, 1235 (N.D. Miss. 1970), appeal dismissed, 400 U.S. 1019, 91 S.Ct. 587, 27 L.Ed.2d 630 (1971); Goodwin v. Wyman, 330 F. Supp. 1038, 1041 (S.D.N.Y. 1971), aff'd, 406 U.S. 964, 92 S.Ct. 2420, 32 L.Ed.2d 664 (1972); see Stanley v. Brown, 313 F. Supp. 749 (D.D.Va. 1970). Given the uncertainty clouding the interpretation of sex classifications under the equal protection clause[7] and the indications that there are some special reasons for the parallel treatment of Title VI and the equal protection clause[8], however, it seems useful to look for alternative approaches to Title IX interpretation, such as the Title VII analysis, supra.[9]

S. Equal Protection

1. Are Sexual Classifications Inherently Suspect?

Recent Supreme Court decisions have created a great deal of uncertainty as to the standard of review of sexual classifications under the equal protection clause.

In Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), the Court held that a mandatory statutory preference given to men over women when, as members of the same entitlement class (e.g., siblings), they apply for appointment as administrator of an estate is a sexual classification which violates the equal protection clause. The Court enunciated its standard (404 U.S. at 76, 92 S.Ct. at 254):

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989 (1920).

The justification advanced for the preference was the time saved by the automatic method for determining the administrator. The Court stated, however, that while the objective of reducing the workload of probate courts is "not without some legitimacy," the state might not be allowed to advance its administrative convenience through a sex classification which eliminated the need for hearings on the merits.

In Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973), the "uniformed services" attempted to defend, on the grounds of administrative efficiency, a policy under which males were permitted to claim their wives as dependents automatically, while females had to show that their husbands were actually financially dependent upon them. Four justices held that sex is an inherently suspect classification subject to strict judicial scrutiny, citing Reed as giving "at least implicit support for such an approach." 93 S. Ct. at 1768. The justices also looked to the history of sex discrimination and to Congressional intent. Citing Title VII, the Equal Pay Act of 1963 (29 U.S.C. Sec. 206(d)), and the Equal Rights Amend-

court, the justices stated (93 S. Ct. at 1777):

> Thus, Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

The justices held that administrative convenience is not a sufficient justification under a standard of strict scrutiny. Three justices concurred in the judgment, but deemed it unnecessary to reach the question of whether sex is a suspect classification. Justice Stewart simply stated that the policy created an "invidious discrimination in violation of the Constitution," citing *Reed*. (93 S. Ct. at 1777)

One interpretation of the *Reed* and *Frontiero* decisions was that the Supreme Court had in effect left a void in the analysis of sex classifications, to be filled in temporarily by lower courts. This was the view of a three-judge court in New Jersey, which filled that void by declaring, "We are persuaded by the opinion of Mr. Justice Brennan in *Frontiero* that sex is 'inherently suspect.'" *Wiesenfeld v. Secretary of Health, Education and Welfare*, 367 F. Supp. 980, 986 (D.N.J. 1973). The court rejected the notion that *Reed* and *Frontiero* (especially the "but-not-substantial relation" language in *Reed*) signaled a general shift in which sex classifications will be treated under some intermediary standard, with greater scrutiny than under the traditional "rational relation" test, albeit less than under the "compelling interest" test. Instead, the court interpreted *Reed* and *Frontiero* as indicating that the proper standard for scrutinizing sex classifications will not be enunciated by the Supreme Court until it is faced with a classification which could be sustained under the rational relation test but not under a close judicial scrutiny test. The district court here held that it was faced with such an issue: a Social Security statute which provided "mother's insurance benefits" to widows but not to widowers was rationally related to the legitimate purpose of rectifying past discrimination by ensuring that the system's limited funds would go to widows, who are less likely than widowers to have their own sources of income. After reaching its holding that sex is inherently suspect and citing language from the plurality opinion in *Frontiero*, comparing sex with race as a classification, the court stated (367):

> While affirmative legislation or executive action may satisfy a compelling governmental interest to utilize sex for the sole purpose of remedying discrimination against such suspect groups as racial minorities, such action cannot meet the higher equal protection standard if it discriminates against some of the group which it is designed to protect. Because Section 402(g) discriminates against women such as Paula Wiesenfeld who have successfully gained employment as well as against men and children who have lost their wives and mothers, we find this section violates the Fifth Amendment. (emphasis added)

The court granted summary judgment to the plaintiff, whose wife had died in childbirth.

Other cases which have treated sex as an inherently suspect classification are *United States v. Hunt*, 281 F. Supp. 8, 14 (D. Conn. 1968) (striking down statute which had effect of longer sentences for some women than for men convicted of the same misdemeanors); *Mussell v. Department of Social Services of City of New York*, 357 F. Supp. 1051, 1053 (S.D.N.Y. 1972) (denying motion to dismiss and motion for summary judgment in mandatory pregnancy-leave case); *Ballard v. Laird*, 360 F. Supp. 640, 647-48 (C.D. Cal. 1973), *prob. juris. noted sub nom. Schlesinger v. Ballard*, 94 S. Ct. 1415 (1974) (striking down statute which maintained differential policies for mandatory military discharge); *Daugherty v. Daley*, 370 F. Supp. 338, 340 (N.D. Ill. 1974) (striking down statutes prohibiting the purchase of drinks by male patrons for female employees); *Andrews v. Drew Municipal Separate School District*, 371 F. Supp. 27, 35-36 (N.D. Miss. 1973) (striking down policy barring employment of unwed parents); *Hall v. Wisconsin Pacific Railroad Company*, 372 F. Supp. 996, 998 (E.D. Tex. 1974) (denying motion to dismiss and motion for preliminary injunction in claim of sex discrimination in lack of promotion and subsequent discharge). *See also Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972), striking down a mandatory maternity-leave policy, after citing *Reed v. Reed*, the court stated (443):

> The plaintiff herein has asserted

the basic right to employment free of invidious discrimination. Under this convention the court must ask not only whether the classification challenged here is rationally related to a legitimate objective of the defendants, but whether, in addition, it promotes any "compelling governmental interest" as that standard is set forth in [illegible] v. Thompson, 394 U.S. 618, 627, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

Two recent Supreme Court cases cast strong questions as to whether lower courts will have the leeway to declare sex a suspect classification.

Kahn v. Shevin, 94 S.Ct. 1734 (1974), appears to be the kind of Supreme Court case of which the dissenting opinion is made. The Court upheld a Florida statute which granted a property tax exemption to widows but not to widowers. After pointing out that among full-time workers the 1972 median income for women was $7,718 per year, for men, a figure six points lower than the 1955 [illegible], and that the disparity is worse for widows, the Court used the *Reed* standard to determine that the policy rested upon "some ground of difference having a fair and substantial relation to the object of the legislation," which was found to be the cushioning of the financial effects of past discrimination. *Id.* at 1736. The Court distinguished *Frontiero* by noting that the sex separation purpose in that case was administrative convenience. The Court also referred to the traditionally large tax breaks afforded to males in the area of taxation. Nevertheless, by holding that a classification based entirely upon a standard of sex that arose entirely regardless of whether one views the *Reed* standard as a traditional or an unacceptable one, without going on to examine it with strict scrutiny, the Court implicitly suggests that it does not believe that strict scrutiny is the appropriate standard for sex classifications.

Justices Brennan, Marshall, and White dissented, adhering to the position spoken in *Frontiero* that sex is a suspect classification. Justice Brennan, joined by Justice Marshall, stated that the statute did serve the compelling interest of rectifying the disproportionate financial burden which law of a widow imposes upon women. Nevertheless, he declared that the statute could not withstand strict scrutiny, since that interest could have been equally served by a [illegible] more direct statute excluding widows of judges from [illegible]. This is similar to the position of Brennan[illegible]

In *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974), the Supreme Court used *Reed*-[illegible] decision not to include coverage of normal pregnancy disability under its disability insurance system was not an invidious discrimination in violation of the equal protection clause. The Court declared that the police did not discriminate against any definable class and simply did not explore the standards appropriate for sex classifications, all showing the least ado in a footnote (1496):

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those involved in *Reed*, *Jeanne*, and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to affect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The perceived justification by the policy was that to include pregnancy coverage would affect both the program's self-supporting nature in which a large increase in rates or a drop [illegible] benefits for covered inadequacies.

The dissenters, Justices Brennan, Douglas and Marshall, read the opinion to be further untrue from *Reed* and *Frontiero*. Indeed, it too seems to imply that the Court's position is what we as a society [illegible]. This can be seen by analyzing the Court's rejection of the exclusion that been the victim of sexism, which affects male and female employees. The fact that all [illegible] contract a disease [illegible] from using a standard of strict scrutiny is critical in assessing the justification for the policy.

The reading of *Kahn* and *Geduldig* is pointing as a view of sex classifications in the